Supreme Court U.S.
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No. 03-

In the Supreme Court of the United States

ABBY RAHN,

Petitioner,

v.

JURIS KAPS, Van Buren County Prosecuting Attorney, in his individual and official capacity; LYNN ANN BULLARD, Van Buren County Friend of the Court, in her individual and official capacity; VAN BUREN COUNTY; VAN BUREN COUNTY BOARD OF COMMISSIONERS, in their official capacities; CALVIN TEAGUE, Van Buren County Administrator, in his individual and official capacity; SHARON DEJA, State Court Administrator's Office Manager, in her individual and official capacity,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Under the test set out in this Court's decisions in *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Board of Education*, 391 U.S. 563 (1968), did the Sixth Circuit err in concluding that, even though Petitioner was speaking out on an issue of public concern, she could be terminated from her position as an assistant prosecuting attorney because her First Amendment rights were outweighed by the interests of her employer?

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The January 23, 2004 Opinion of the United States Court of Appeals for the Sixth Circuit is not officially reported. That Opinion is reproduced in the attached Appendix, beginning at page 1a.

The Order of the United States District Court for the Western District of Michigan adopting the Magistrate's Report and Recommendation and granting Respondents' Motion for Summary Disposition is not officially reported. That opinion is reproduced in the attached Appendix, beginning at page 18a.

The Magistrate's Report and Recommendation recommending the grant of Respondents' Motion for Summary Judgment is not official reported. That Report is

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its decision in this case on January 23, 2004. (App. 1a). This Court's jurisdiction is being invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> *U.S. Const., Amend. I*

STATEMENT OF THE CASE

Petitioner Abby Rahn was hired as an Assistant Prosecutor in the State of Michigan's Van Buren County prosecutor's office in 1982. The prosecutor who hired Ms. Rahn was Juris Kaps, who was the Van Buren County Prosecutor throughout the course of Ms. Rahn's seventeen years of employment in that office.

When Ms. Rahn was initially hired, she was assigned as the Assistant Prosecutor handling child support and paternity matters. Ms. Rahn was to hold this position for nearly her entire tenure in the prosecutor's office. In that role, Ms. Rahn's duties included the handling of litigation establishing paternity and obtaining child support payments as authorized by Michigan's Paternity Act, MCL 722.714, and Michigan's Family Support Act, MCL 552.454.

While Ms. Rahn worked as the Assistant Prosecutor in charge of child support and paternity matters, she took steps to protect the independence and integrity of the Assistant Prosecutor's role in that process. For example, in 1995 supervision over Ms. Rahn in her role as Assistant Prosecutor was transferred from Mr. Kaps, the County Prosecutor, to the Van Buren County Circuit Court's Friend of the Court. The Friend of the Court is the administrative arm of the circuit court in domestic relations matters and operates on the instructions of the Chief Judge of the Circuit Court.

When this supervision change was announced, Ms. Rahn wrote a memorandum to Mr. Kaps objecting to the change. In that letter, Ms. Rahn contended that the relationship between the circuit court and the Friend of the Court raised significant conflict of interest concerns if her work as a prosecutor were supervised by an arm of the court. After Ms.

Rahn voiced ethical objections to her prosecutorial work being supervised by an administrative arm of the circuit court, Mr. Kaps rescinded the decision to have Ms. Rahn supervised by the Friend of the Court and he resumed the role as her direct supervisor.

In the summer of 1999, a management assessment team formed by Michigan's State Court Administrative Office (hereinafter: "SCAO") conducted a review of the operation of the Van Buren County Circuit Court. Among the members of the management assessment team which examined the Van Buren County Circuit Court was Sharon Deja. In the course of the management assessment study, Ms. Deja determined that Van Buren County might be an appropriate candidate for a new program being developed for the handling of paternity and child support matters. In that program, the functions of the Prosecutor's Office and the Friend of the Court would be merged. Both the County Prosecutor, Mr. Kaps, and the head of the county's Friend of the Court office, Lynn Bullard, agreed to pursue the arrangement in which prosecutorial functions and Friend of the Court responsibilities would be combined.

Ms. Deja made a presentation in support of the combined program to the Van Buren County Board of Commissioners. Following that presentation, the Board of Commissioners approved the changes and the program was implemented. Thus, the child support and paternity functions which Ms. Rahn had performed for approximately seventeen years were transferred to the Friend of the Court.

On September 17, 1999, Mr. Kaps informed Ms. Rahn that the child support division of the Prosecutor's Office would be disbanded as of September 30, 1999, and that thereafter the Van Buren County Friend of the Court would

perform all prosecutorial functions in paternity and child support cases. Ms. Rahn was transferred to the criminal division of the prosecutor's office effective October 1, 1999.

Ms. Rahn believed that the transfer of the prosecutorial functions which she had previously performed to an administrative arm of the circuit court gave rise to significant legal and ethical concerns. Ms. Rahn proceeded to communicate these concerns to a number of individuals.

On September 28, 1999, Ms. Rahn wrote a letter to Van Buren County Circuit Court Judge Paul E. Hamre. In that letter, Ms. Rahn expressed to Judge Hamre that the program to be instituted in the Van Buren Circuit Court was unlawful and unethical and would involve the Friend of the Court in the unauthorized practice of law.

Ms. Rahn's September 28, 1999 letter was written on Van Buren County Prosecuting Attorney stationery. Ten days after that letter was written, Mr. Kaps met with Ms. Rahn to discuss that letter and its contents. During that meeting, Mr. Kaps wanted to know if Ms. Rahn intended to communicate with anyone else concerning the changes which had taken place in the prosecutor's office. At this meeting, Mr. Kaps did not ask Ms. Rahn to abandon altogether her legal and ethical challenge to the Friend of the Court being invested with prosecutorial functions. Mr. Kaps advised Ms. Rahn that she could still pursue her challenge to the SCAO program on a "statewide" basis. As Mr. Kaps later explained in a deposition taken in this case:

> As it relates to a state-wide issue, a legal issue, pursue that with anybody you choose to on your own time. As it relates specifically to decisions made in Van

> Buren County by myself, I don't expect you to undermine what I have done.

Mr. Kaps did, however, insist that any future written communication made by Ms. Rahn not be made on prosecutor's office stationery.

On October 15, 1999, using a letterhead which contained only her home address, Ms. Rahn wrote a letter to Wallace Dutkowski, the Director of the Office of Child Support. In that letter, Ms. Rahn again asserted that the Van Buren County Friend of the Court's assumption of prosecutorial duties in child support cases was "without legal authority, contrary to existing ethical regulations and opinions and in violation of federal law . . ."

Six days later, Ms. Rahn wrote another letter, this time to John Ferry, the Director of the SCAO. In that letter, Ms. Rahn again observed that there were "significant and serious questions" concerning the Friend of the Court's new prosecutorial role in Van Buren County. Ms. Rahn's October 21, 1999 letter to Mr. Ferry sought clarification as to the role which the SCAO played in implementing the Van Buren County Circuit Court program.

On November 9, 1999, Ms. Rahn filed a grievance with the Michigan Attorney Grievance Commission against Ms. Bullard, the Van Buren County Friend of the Court. In that grievance, Ms. Rahn asserted that Ms. Bullard, an attorney, should be investigated for misconduct related to the "ethical and legal violations inherent in Defendant Bullard's participation in the Court/Friend of the Court scheme."

On December 9, 1999, Mr. Kaps met with Ms. Rahn and advised her that he was relieving her of her duties as an

Assistant Prosecutor. Mr. Kaps notified Ms. Rahn of her termination in a December 20, 1999 letter which detailed his reasons for firing Ms. Rahn. In that letter, Mr. Kaps cited Ms. Rahn's ethical and legal challenge to the County's new paternity/child support program as a basis for his decision to terminate her. Mr. Kaps further indicated that he was terminating Ms. Rahn because her continued efforts to challenge the SCAO program was in direct violation of his previous directives.

On March 20, 2000, Ms. Rahn instituted this action in the United States District Court for the Western District of Michigan based on 42 U.S.C. § 1983. Ms. Rahn alleged in her Complaint that she was terminated in retaliation for having exercised her First Amendment rights in challenging both the lawfulness and the ethics of investing an administrative arm of the circuit court with prosecutorial functions. Ms. Rahn further alleged that the defendants had engaged in a conspiracy to violate her First Amendment rights.

In October 2001, the defendants filed motions seeking the dismissal of Ms. Rahn's claims. These motions were referred to Magistrate Judge Hugh W. Brenneman, Jr., for a Report and Recommendation. On January 7, 2002, Magistrate Judge Brenneman issued a Report and Recommendation. (App. 23a-42a).

Respondents had argued that they were entitled to summary judgment on Ms. Rahn's First Amendment claim because the speech which formed the basis for that claim was not "on a matter of public concern." *Connick v. Myers*, 461 U.S. 138, 146 (1983). Magistrate Judge Brenneman rejected that argument. He concluded that Ms. Rahn's First Amendment rights were implicated since the letters which she

had written "raised issues of concern to the community, *i.e.* whether the Van Buren County government was operating in accordance with the law with respect to child support matters." (App. 33a).

Despite this conclusion, Magistrate Judge Brenneman recommended dismissal of Ms. Rahn's First Amendment claim. He did so on the ground that Ms. Rahn's interest in commenting on a matter of public concern was outweighed by Mr. Kaps' interest in managing the internal affairs of his office. (App. 34a-37a).

Ms. Rahn filed objections to Magistrate Judge Brenneman's Report and Recommendation. On March 12, 2002, Judge Gordon J. Quist issued an Order adopting the Magistrate Judge's recommendation that Ms. Rahn's claims be dismissed. (App. 18a-22a). In that Order, the district court upheld the Magistrate Judge's ruling that, while Ms. Rahn was engaged in speech on a matter of public concern, her First Amendment rights were outweighed by Mr. Kaps' interest in the efficient operation of his office.

Ms. Rahn appealed to the Sixth Circuit Court of Appeals, which issued its decision affirming the district court's judgment on January 23, 2004. (App. 1a-22a). The Sixth Circuit agreed that Ms. Rahn's letter-writing campaign represented protected First Amendment activity under *Connick*. (App. 9a-11a). The Sixth Circuit, however, upheld the district court's determination that Ms. Rahn's First Amendment interest was outweighed by Mr. Kaps' interest in managing his office. (App. 11a-21a).

REASONS FOR GRANTING THE WRIT

The central allegation made by Ms. Rahn in this case was that her position as an Assistant Prosecutor was terminated in retaliation for having exercised her First Amendment rights. The legal analysis which applies to such a First Amendment claim brought on behalf of a public employee is governed by the balancing test developed and applied in *Pickering v. Board of Education of Township*, 391 U.S. 563 (1968) and *Connick*, *supra*. Under the *Pickering/Connick* test, to succeed on her First Amendment claim, Petitioner had to establish that the speech for which she was terminated involved a matter of public concern. If that first requirement is satisfied, the inquiry then turns to the question of whether the governmental employer's interest in promoting the efficiency of the services it performs outweighs the First Amendment interest of the employee in commenting on matters of public concern.

The Sixth Circuit ruled that Ms. Rahn satisfied the first component of this three part test, holding that Ms. Rahn was terminated for speaking out on a matter of public concern. The Sixth Circuit held, however, that summary judgment was appropriate on Ms. Rahn's First Amendment claim because her interest in speaking out on a matter of public concern was outweighed by her former employer's interest in running an efficient public office. The Sixth Circuit's resolution of the *Pickering/Connick* balancing test was flawed.

The Sixth Circuit's balancing of the competing interest was initially erroneous in that it failed to give sufficient weight to the First Amendment rights which Ms. Rahn possessed. The Magistrate Judge had previously found that Ms. Rahn had been commenting on a matter of public concern since her comments went to the question of "whether the Van Buren County government was operating in accordance with

the law with respect to child support matters." (App. 33a). Thus, the speech which was the subject of this case centered on whether various state and county officials were acting illegally when they transferred duties which had been prosecutorial functions to an arm of the circuit court.

Having reached the conclusion that Ms. Rahn was fired for statements relating to a matter of public concern, the Sixth Circuit failed to accord that conclusion its full weight in striking the balance called for by *Pickering* and *Connick*. The Sixth Circuit, instead, found this case to be controlled completely by the result reached in *Connick*, a case which also arose out of a prosecutor's office.

The Sixth Circuit's comparison of this case to *Connick* was not apt in one important respect. In *Connick*, the expressive conduct which led to the assistant prosecutor's termination consisted of the dissemination of a questionnaire to fellow employees. This Court found in *Connick* that, with but one exception, that questionnaire did not touch upon matters of public concern. Thus, addressing itself to the balancing test called for in *Pickering*, the First Amendment interest of the employee involved in *Connick* was confined to a single question on the questionnaire which she had distributed.

The limited character of the First Amendment interest involved in *Connick* proved decisive. The Court found the employee's First Amendment interest to be outweighed by the prosecutor's interest in the effective operation of his office. Yet, in arriving at this conclusion based on the facts presented in *Connick*, the Court added: "We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Id.* at 152.

Based on the Sixth Circuit's conclusion that Ms. Rahn was speaking out on a matter of public concern when she voiced her opposition to the transfer of prosecutorial functions to the Friend of the Court, this case was necessarily governed by the "stronger showing" of governmental interest called for by *Connick*. The Sixth Circuit erred in failing to apply this aspect of the *Connick* decision to this case.

This case involves communications by the Petitioner on the fundamental question of whether the county government "was operating in accordance with the law." (App. 33a). Such a statement regarding potentially illegal conflict on the part of a governmental agency must be accorded substantially greater weight than it was by the Sixth Circuit herein.

The Sixth Circuit further erred in assessing the other half of the balancing equation called for in *Pickering* and *Connick*. In *Pickering*, the Court recognized that a public employer has an interest "in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. In *Connick*, the Court identified various ways in which these interests could be adversely affected. *Id.* at 150-154.

It is clear that a number of the factors identified by this Court in *Connick* do nothing to support Respondents' position. There was no evidence in this case that Ms. Rahn's exercise of her First Amendment rights meaningfully interfered with the performance of her duties. As such, there was no evidence presented demonstrating that Ms. Rahn's statements somehow undermined a legitimate goal or mission of the prosecutor's office. Moreover, Ms. Rahn communicated with people outside the prosecutor's office whom she believed had an interest in her concerns regarding the legality and ethics of a program in which prosecution functions were assigned to an administrative arm of the court.

Thus, there is no evidence that Ms. Rahn's comments in any way affected her relationship with co-employees. There was, moreover, no evidence presented in this case that the speech itself somehow impaired discipline within her office. Again, there was no evidence that any of Ms. Rahn's co-employees were aware of the concerns which she was communicating to individuals outside the prosecutor's office. Thus, there can be no assertion that discipline within the office was somehow disrupted by Ms. Rahn's speech.

Thus, the Respondents could not establish any one of these factors which have been deemed relevant by this Court in weighing the parties' respective interest under the *Pickering* test. The fact that the defendants could not prevail on any of these factors should have been a consideration which the district court weighed directly against the defendants.

The Sixth Circuit, however, did not address any of the factors in the *Pickering/Connick* analysis which Respondents could *not* establish. Instead, it focused almost exclusively on the one factor which, in its view, was in the Respondents' favor. Citing the October 21, 1999, letter which Ms. Rahn wrote the SCAO's Director, the Sixth Circuit observed that this letter questioned Mr. Kaps' veracity and, on the basis of that letter, Mr. Kaps "reasonably could question her loyalty. This letter could be challenged as one that would undermine office relations." (App. 14a). This interest in a "loyal" and "trustworthy" work force was also cited by Mr. Kaps in the letter which he wrote to Ms. Rahn explaining the reasons for her termination. As he indicated in his December 20, 1999 letter, "I simply cannot have an employee whom I cannot trust. I cannot have an employee who, when a final decision is made, will not abide by it."

By suggesting that Ms. Rahn's interest in speaking out on a matter of public concern could be outweighed by her employer's interest in maintaining a loyal and trustworthy workforce, the Sixth Circuit ignored the context in which Ms. Rahn exercised her First Amendment rights and it also ignored why Mr. Kaps found Ms. Rahn to be "disloyal" and "untrustworthy".

Shortly after Ms. Rahn first expressed her legal and ethical concerns over the assignment of prosecution functions to the Friend of the Court, she met with Mr. Kaps. According to Mr. Kaps, he advised Ms. Rahn at that time that she could pursue her concerns that the restructuring of the Friend of the Court duties was both unethical and illegal, provided that she pursued these concerns on a "statewide basis." Thus, Mr. Kaps gave Ms. Rahn permission to attack the ethics and legality of a hypothetical Friend of the Court assuming a prosecutorial role, so long as Ms. Rahn did not attack the ethics or legality of the one system which she was aware of in which these legal and ethical concerns had arisen concretely - the program in existence in Van Buren County.

Mr. Kaps proceeded to terminate Ms. Rahn because she violated his instructions. Apparently, Mr. Kaps found Ms. Rahn to be disloyal and/or untrustworthy because she saw fit to publicly discuss the program which was in existence in Van Buren County. Mr. Kaps advised Ms. Rahn that she could pursue the ethical and legal improprieties associated with a Friend of the Court exercising prosecutorial functions, so long as she did not involve Van Buren County in these claims of illegality or ethics violations. Thus, Mr. Kaps advised Ms. Rahn in advance that she could not exercise her First Amendment rights to bring to light illegality or ethical improprieties occurring in Van Buren County. When Ms. Rahn, by Mr. Kaps' reckoning, violated his instructions by

raising the question of whether the Van Buren County program was itself illegal or unethical, Ms. Rahn became a "disloyal" and "untrustworthy" employee, subject to immediate termination.

If the reasoning of the courts below is followed to its logical conclusion, what this case involves is a situation in which a public employer instructed an employee not to exercise First Amendment rights on a matter of public concern. When the employee subsequently exercised her First Amendment right to discuss this issue of public concern, that employee may immediately be terminated and that termination will be found constitutionally permissible because the exercise of First Amendment rights on an issue of public concern immediately renders the employee "disloyal" and "untrustworthy."

What should be obvious is that if Respondents are correct in their arguments in this case, all First Amendment rights of public employees could prove to be illusory. A public employer could advise its employees in advance that all First Amendment activity on the part of its workforce, regardless of whether that First Amendment activity concerns matters of public concern or not, is prohibited. An employee who violates that policy by engaging in First Amendment activity on a matter of public concern would then be subject to immediate dismissal because the violation of the employer's directive by itself establishes that the employee involved is "disloyal" and "untrustworthy."

This is not an appropriate result under *Pickering* and *Connick*. It is a particulary inappropriate result when considered in light of the nature of Ms. Rahn's First Amendment activity in this case. For, as the Magistrate Judge acknowledged, Ms. Rahn's First Amendment activity

touched on a matter of public concern because it involved the fundamental question of "whether the Van Buren County government was operating in accordance with the law with respect to child support matters." (App. 33a). Thus, if Respondents and the courts below were correct in this case, an employer could instruct an employee not to publicly divulge any illegality with respect to how a governmental entity or governmental agency is functioning, and, should that employee ignore that order and divulge such illegalities, that employee immediately becomes subject to termination because she has violated a direct instruction, thereby demonstrating her disloyalty and lack of trustworthiness.

The Sixth Circuit's application of the *Pickering* balancing test was misguided. The Court gave insufficient weight to Ms. Rahn's interests in exercising her First Amendment rights to challenge illegalities or unethical conduct occurring in the program instituted by Van Buren County. The Court also seriously erred in giving overriding weight to the Respondents' interest in maintaining a loyal and trustworthy workforce.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: April 22, 2004

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 02-1478

[Filed January 23, 2004]

ABBY RAHN,
Plaintiff-Appellant,

v.

JURIS KAPS, Van Buren County Prosecuting Attorney, in his individual and official capacity; LYNN ANN BULLARD, Van Buren County Friend of the Court, in her individual and official capacity; VAN BUREN COUNTY; VAN BUREN COUNTY BOARD OF COMMISSIONERS, in their official capacities; CALVIN TEAGUE, Van Buren County Administrator, in his individual and official capacity; SHARON DEJA, State Court Administrator's Office Manager, in her individual and official capacity,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN. 00-00033. Quist. 03-13-02.

Before: ROGERS and COOK, Circuit Judges; and COHN, District Judge.*

ROGERS, Circuit Judge. Abby Rahn, a former assistant prosecutor in Van Buren County, Michigan, appeals the grant of summary judgment in favor of her former employer Juris Kaps, the Prosecuting Attorney of Van Buren County. Lynn Ann Bullard, the Van Buren County Friend of the Court; Sharon Deja of the State Court Administrator's Office; Calvin Teague, the Van Buren County Administrator; the Van Buren County Board of Commissioners, and the county itself. Rahn's lawsuit, predicated on 42 U.S.C. § 1983 and the First and Fourteenth Amendments, alleged that she was terminated from her position as an assistant prosecutor because she engaged in protected speech activity. The issue presented in this appeal is whether the termination of Rahn's employment passes muster under the balancing test articulated by the Supreme Court's decisions in *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) and *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708(1983). We find that it does, and we therefore affirm the judgment of the district court.

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* The Honorable Avern Cohn. United States District Judge for the Eastern District of Michigan, sitting by designation.

BACKGROUND

I. Rahn's Work as Family Law Prosecutor

Rahn began her tenure as an Assistant Prosecuting Attorney in Van Buren County, Michigan, in 1982. Her earliest duties involved seeking child support orders against parents on behalf of the Prosecuting Attorney. During her service in this position, Rahn generally took steps to establish legal paternity and would seek the entry of a child support order once paternity was conclusively established. Rahn's position required her to work closely with staff from the Office of Child Support ("OCS") and the Van Buren County Friend of the Court office ("FOC").

The parties do not dispute that Rahn had a historically rocky relationship with her supervisors and co-workers, which deteriorated further in the mid-to-late 1990's, when Kaps, Bullard and, the staff of the state court system began to explore ways to merge the prosecutorial functions of the FOC and the Prosecuting Attorney's Office in child support and paternity matters. Early on in this process, Rahn began to voice concerns about the ethical implications of such a merger. Rahn was concerned that the restructuring would place prosecuting attorneys responsible for child support and paternity matters in an impermissible conflict of interest because they would be supervised directly by agents of the same court that adjudicates child support and paternity matters. After Rahn's initial objections were rejected or disregarded, she began to resist changes resulting from the merger by refusing to cooperate with FDC staff.

2. Rahn's Letter Writing Activity

In November of 1996, Kaps reprimanded Rahn in writing for her refusals to cooperate with FOC staff members. In the reprimand. Kaps instructed Rahn to cooperate fully with the FOC and to report to him weekly on the productivity of her office. Kaps asked Rahn to put her concerns about the handling of child support and paternity matters behind her and focus on fulfilling the duties of her position. Rahn, however, refused to accept this letter as the conclusion of the matter.

On March 3, 1997, using the letterhead of the Van Buren County Prosecutor, Rahn wrote a memorandum to John Carpenter of the St. Joseph's County Prosecutor's Office. The memorandum outlines a series of arguments against placing the prosecutor's child support and paternity responsibilities under FOC supervision. On March 17, 1997, using the prosecutor's letterhead, Rahn wrote a letter to Wallace Dutkowski, the Director of OCS, objecting to the new structure in place in Van Buren County and protesting the possible imposition of a similar structure in St. Joseph's County.

By the summer of 1999, however, the opinions of many state officials on the matter were running contrary to Rahn's. The merger of prosecutorial and FOC duties in St. Joseph's County that Rahn had protested in 1997 was, in fact, representative of a sea change in the way in which Michigan counties handled child support and paternity matters. After the State Court Administrator's Office recommended to Van Buren County officials that the FOC and Prosecuting Attorney's office totally merge their child support and paternity functions. Kaps informed Rahn that her job was being absorbed into the FOC and that she would be

transferred to the Criminal Division of the Prosecutor's Office.

3. Rahn's Termination

Tensions between Rahn and Kaps came to a head after Rahn's transfer to the criminal division. After the transfer, Rahn stepped up her letter writing activities. On September 28, 1999, Rahn wrote a letter to Judge Paul Hamre on the prosecutor's letterhead, expressing her concerns regarding the legality of the merger. Judge Hamre responded, thanking Rahn for her letter and dismissing her concerns on the grounds that the merger was the product of informed decisions by the proper elected officials. Unsatisfied by this response. Rahn wrote back to Judge Hamre on September 30. again using the prosecutor's letterhead. In her second letter, Rahn asked the judge to provide the legal authority for the merger. This second letter drew a swift rebuke from Judge Hamre, who refused her request and instructed her to communicate any further concerns through the Prosecuting Attorney.

On October 8, 1999, Rahn met with Kaps for her weekly review. At this meeting, Kaps asked Rahn if she was "through with letter writing" and asked her to stop using the prosecutor's letterhead for letter writing connected with her opposition to the child support and paternity restructuring. He also asked her not to do anything to undermine his authority as Prosecuting Attorney. Kaps suggested to Rahn that if she wanted to object to the restructuring, she should do so as a private citizen and on a statewide level, rather than as pertained to Van Buren County.

Rahn must have misunderstood what Kaps meant by pursuing the matter on a "statewide level." because her next

step was to write a letter, this time on her own letterhead, to Wallace Dutkowski, the director of the Michigan Office of Child Support. The October 15 letter to Dutkowski accuses the Van Buren County Friend of the Court of "undertaking prosecutorial litigation obligations in child support cases without legal authority, contrary to existing ethical regulations and opinions and in violation of federal law regarding separation of powers." On October 21, 1999, Rahn wrote a letter to the Director of the State Court Administrator's Office, warning that the merger threatened "a number of seeming ethical and legal violations." The letter asked for information regarding the involvement of the State Court Administrator's Office, and specifically Deja, in the merger.

All indications suggest that, amid this flurry of letter writing. Rahn's work performance as an assistant prosecutor was suffering. Kaps grew concerned about her chronic tardiness and her regular practice of keeping her office door closed, which Kaps believed would deter law enforcement officers from feeling comfortable coming into her office to discuss cases. Chronic lateness soon became chronic absence. Early in November. Kaps confronted Rahn with her absenteeism. eventually suspending her for three days without pay for failing to call in to explain her absences. While Rahn was suspended, Kaps entered her office to find neglected work on her desk. After Rahn's suspension, Kaps placed her on paid leave and eventually terminated her employment.

4. Procedural History

On March 20, 2000, Rahn filed a complaint claiming, *inter alia,* that the defendants had violated her rights under the First Amendment, and had entered a conspiracy to violate those same rights, in violation of 42 U.S.C. §§ 1983 and 1985. At the close of discovery, all defendants filed motions

for summary judgment. On January 7, 2002, the magistrate judge issued a Report and Recommendation that the district court grant the defendants summary judgment on Rahn's federal claims, and dismiss the state law claims she had sought to include under the supplemental jurisdiction of the federal courts.

The magistrate judge concluded that Rahn's letter writing touched on a matter of public concern. He noted, in particular, Judge Hamre's admission in his September 30 response to Rahn that county officials had debated the "pros and cons" of the issue. The magistrate judge concluded that because the issue was capable of inspiring debate among public officials, it could fairly be characterized as a matter of public concern.

Nevertheless, the magistrate judge found that the state's interests outweighed Rahn's right to First Amendment protection. He noted first, that elected prosecutors generally have wide discretion to manage their offices. He explained that Michigan law provides that assistant prosecutors serve at the pleasure of the elected prosecutor. Citing our opinion in *Monks v. Marlinga*, 923 F.2d 423, 425-26 (6th Cir. 1991), the magistrate judge found generally that a prosecuting attorney in Michigan retains "wide discretion to terminate the employment of prosecutors." Moreover, the magistrate judge concluded, a prosecuting attorney in Michigan also may demand loyalty from assistants. As a result, the magistrate judge concluded, an assistant prosecutor in Michigan is entitled to "substantially less First Amendment protection ... than a lower level employee."

Finding that Rahn's actions under the circumstances "could certainly erode defendant Kaps' confidence and trust in plaintiff," the magistrate judge concluded that Rahn's

speech interest did not outweigh Kaps's interest in managing his office. Because she could not establish that Kaps's actions violated her First Amendment rights, the magistrate judge concluded that her claims against all other defendants failed as a consequence. As none of Rahn's federal claims could withstand summary judgment, the magistrate judge recommended that the district court dismiss Rahn's state law claims for lack of jurisdiction. The district court reviewed the magistrate judge's findings and conclusions *de novo,* and, over Rahn's extensive objections, adopted the report in its entirety.

DISCUSSION

1. Standard of Review

A district court's decision to grant summary judgment is subject to *de novo* review. *Tinker v. Sears, Roebuck & Co.*, 127 F.3d 519, 521 (6th Cir. 1997). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of showing that no genuine issue of material fact remains in dispute. *Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 861 (6th Cir. 1986). The moving party does not, however, need to produce evidence showing the absence of a genuine issue of material fact. Instead, "the burden on the moving party may be discharged by 'showing'--that is, pointing out to the [] court--that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). At the summary judgment phase, the facts, as well as any inferences that can be drawn from them,

must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). In determining whether a factual issue is genuine for the purposes of summary judgment in most civil cases, a court must decide "whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

2. Rahn's Letter Writing Activities Touched on a Matter of Public Concern

The district court properly determined that Rahn's speech activity touched on a matter of public concern. In *Connick,* the Supreme Court indicated generally that speech touches on a matter of public concern when it relates to "any matter of political, social or other concern to the community." *Connick*, 461 U.S. at 146. It is the content of the speech, rather than the motive of the speaker, that resolves the question of whether the speech relates to matters of public concern.

> Even if a public employee were acting out of a private motive with no intent to air her speech publicly, as was the case with Myers [the plaintiff in *Connick*], so long as the speech relates to matters of "political, social or other concern to the community," as opposed to matters "only of personal interest," it shall be considered as touching upon matters of public concern.

Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1052 (6th Cir. 2001).

In some instances, the employee's speech activity concerns a mix of public and personal matters. *See, e.g., Connick*, 461 U.S. at 140-41 (after objecting to transfer within office, assistant prosecutor generated survey which partly asked respondents's opinions on internal matters, but also asked whether respondents felt pressured to work in political campaigns); *Banks v. Wolfe County Bd. of Educ.*, 330 F.3d 888, 891 (6th Cir. 2003) (after having been passed over for teaching position in public elementary school, sending written complaint letters regarding hiring process to state agency): *Bonnell v. Lorenzo*, 241 F.3d 800, 804-05 (6th Cir. 2001) (reacting to having been named in sexual harassment complaint, plaintiff, a college professor, distributed redacted copies of complaint and eight-page satirical essay to students, faculty and media outlets). If any aspect of a speech activity that gives rise to an adverse employment action touches on matters of public concern, the court must apply the *Pickering-Connick* balancing test. *See Bonnell*, 241 F.3d at 812 (citing *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 366 (5th Cir. 2000)).

The district court correctly concluded that Rahn's letters touched on matters of public concern because they raised issues that "that involved a matter of public policy that could be debated among public officials and which resulted in the elimination of the prosecutor's child support division." The defendants do not strongly challenge this finding, but do allude to "evidence suggesting that Rahn was motivated by her own personnel disputes and grievances ... "

While Rahn's personal motivations may have some relevance, the focus of the analysis remains on the content of the speech. *See Banks*, 330 F.3d at 894 (citing *Chappell v. Montgomery County Fire Protection Dist. No. 1*, 131 F.3d

564 (6th Cir. 1997)) (explaining that "the subjective intent of the speaker, while relevant, is not a controlling factor"). The defendants's suggestion that the letters were motivated by Rahn's personal concerns, even if accurate, is insufficient for us to conclude that the letters did not touch on matters of public concern. *See Bonnell, supra.* Although the defendants identified some facts in the record indicating that Rahn pursued her letter writing activity out of a self-serving motive, the district court was nonetheless correct in determining that Rahn's letter writing touched on a matter of public concern.

3. Kaps's Management Interest Outweighed Rahn's Speech Interest

Even so, Rahn has failed to show, as required by the controlling Supreme Court precedents in this area, that her interest in conveying her message outweighed her employer's interest in managing his office. *Pickering* requires, according to *Connick,* "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150. Generally, where an employee's conduct is so disruptive that it unduly hinders a government entity's ability to satisfy its duties to the public, then that conduct is not entitled to *First Amendment* protection. *See id.* at 151 (citing *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974) (Powell, J. concurring)). Moreover, "when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Id.* at 151-52.

Under Michigan law, an assistant prosecuting attorney serves at the pleasure of the prosecuting attorney. MICH. COMP. LAWS ("MCL") § 49.42 (2003). The phrase is commonly understood to mean that assistant prosecuting

attorneys, like other political appointees, enjoy little job security to protect them from the "whims of each administration." *James v. City of Burton*, 221 Mich. App. 130, 133, 560 N.W.2d 668, 670-71 (Mich. Ct. App. 1997). The *Pickering-Connick* test applies with full vigor in cases in which the employee is a political or "policy-making" appointee, but the employer may be entitled to even more deference where the employee is terminable-at-will. *See Connick*, 461 U.S. at 140 (noting that plaintiff served at the pleasure of defendant district attorney); *see also Monks v. Marlinga*, 923 F.2d 423, 426 (6th Cir. 1991) (holding that politically motivated discharge of assistant prosecutors in Michigan does not offend First Amendment).

Although Rahn's letter writing touched on a matter of public concern, Kaps's interest in managing his office nevertheless outweighed Rahn's interest in conveying her message. Rahn raises two perceived problems with the district court's *Pickering-Connick* analysis. She first contends that the district court erred by failing "to give sufficient weight to the First Amendment rights which [she] possessed," and therefore, that the district court granted summary judgment on an insufficient showing of governmental interest. Second, she maintains that, as a matter of law, the district court could not have concluded that the Prosecuting Attorney's interests could have outweighed her First Amendment rights because her letter writing was intended to expose unlawful activity in the workplace. Rahn maintains that, because of the nature of her speech, her interests are "co-extensive" with those of the employer. Each of these contentions is without merit.

Rahn maintains that where the speech "substantially involves matters of public concern, the defendant must be subjected to some greater showing of countervailing governmental interest than in the ordinary case. The thrust of

her argument is that the district court assigned too much weight to Kaps's interests in having loyal and trustworthy employees. She also intimates that the district court erred in ignoring Kaps's reasons for firing her--that disloyalty was pretense for retaliation against an employee who was seeking to expose official malfeasance.

Rahn, however, runs directly into *Connick*. In that case, an assistant prosecutor, serving at the pleasure of the district attorney, objected to the reassignment of her job responsibilities to a different department within the office. *Connick*, 461 U.S. at 140. After her objections fell on deaf ears, she quietly began asking her peers how they felt about the transfer. *Id.* at 141. After one of her colleagues suggested that the other assistant prosecutors did not share her objections, she decided to prepare a survey of her colleagues, seeking their views on several internal office matters. *Id.* The survey did, however, contain one question that asked the assistant prosecutors if "you ever feel pressured to work in political campaigns on behalf of office supported candidates?" *Id.* at 141, 155.

The same day the plaintiff distributed her survey, the district attorney terminated her employment. *Id.* at 141. His proffered reasons were that she had refused to accept the transfer and that she was insubordinate when she distributed the survey. *Id.* The district attorney primarily objected to two questions on the survey: (1) whether the assistant prosecutors "had confidence in and would rely on the word" of certain supervisors in the office, and (2) the political campaigning question. *Id.* The Supreme Court nevertheless held that the district attorney's interests outweighed the plaintiff's

Although Rahn may maintain that her letter writing was not necessarily as disruptive as the survey in *Connick*. Rahn's

conduct nevertheless had the "clear potential for undermining office relations." *Id.* at 152. For example, Kaps cited Rahn's October 21, 1999, letter to the State Court Administrator's Office as one incident giving rise to his decision to fire her. Kaps noted that in the letter Rahn "questioned the integrity of the Circuit Judge and at least indirectly that of the Friend of the Court, Sharon Deja, and myself." A reasonable person could have concluded that those statements questioned the veracity of those involved in the child support restructuring in Van Buren County and may have impugned the integrity of a judge before whom her job may require her to appear. Therefore, Rahn's activities were certainly undermining her ability to work as an assistant prosecuting attorney. Furthermore, having at least questioned the veracity of Kaps, he reasonably could question her loyalty. This letter could be characterized as one that would undermine office relations.

Relying on language from *Cockrel,* Rahn urges the panel to reverse the grant of summary judgment because Kaps affirmatively told Rahn that she could pursue her concerns on a "statewide basis." Under *Cockrel,* if the public employer approves or encourages the speech activity, it cannot later be heard to assert that the speech was disruptive. *Cockrel*, 270 F.3d at 1054-55. Rahn, however, ignores the undisputed fact that, in the same conversation in which Kaps told Rahn she could pursue the matter on a statewide basis, he also instructed her not to undermine his authority. Implicit in his permission for her to pursue the matter on a statewide basis was an expectation that if she did pursue her concerns on a statewide basis, that she would not do so in a manner that could be expected to undermine Kaps's authority. When she went to the State Court Administrator's Office, she referred specifically to Van Buren County and portrayed the officials involved in the restructuring process as disingenuous. This is not the situation in which Kaps, with full knowledge of what

Rahn intended to do, approved the activity and then, after the fact, discovered that it was damaging to workplace morale. Instead the letter to the State Court Administrator's Office referred specifically to Van Buren County and called into question the veracity of county officials. Rahn exceeded the scope of the approval Kaps gave her to pursue her concerns, and therefore, *Cockrel* does not apply.

Connick, however, is directly on point. The Court explained that:

> This is not a case where an employee, out of purely academic interest, circulated a questionnaire so as to obtain useful research. Myers acknowledges that it is no coincidence that the questionnaire followed upon the heels of the transfer notice. When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office.

Connick, 461 U.S. at 153. Similarly, Rahn did not pursue her letter writing out of a detached interest in the legal and ethical implications of the restructuring of child support and paternity matters in Van Buren County. Rahn's letters clearly arose from her disagreement with her employers about policies that applied to her own job. Although she wrote the State Court Administrator's Office after her job was phased out, it can be connected in the same chain of activities relating to her disagreement with Kaps about whether the FOC could conduct prosecutorial tasks. Kaps could easily have perceived Rahn's pursuit of the matter with judges and state officials,

after receiving an unsatisfactory answer from Kaps, as a direct challenge to his authority.

Rahn further maintains that, because she was speaking out against allegedly unlawful practices in the Prosecuting Attorney's office, her interests are "co-extensive" with those of the government, and therefore, the governmental interest can never outweigh them. This argument is unavailing. In support of her point, she cites *Marohnic v. Walker*, 800 F.2d 613 (6th Cir. 1986), and *Williams v. Kentucky*, 24 F.3d 1526 (6th Cir. 1994), but neither case compels the conclusion that Rahn's speech interest outweighs Kaps's management interest.

Marohnic involved retaliation against an employee who agreed to aid an investigation of fraud within a government agency. *Marohnic*, 800 F.2d at 614. After Marohnic aided the investigation, his employer began reprisals against him that eventually forced him out of the workplace. *Id.* Marohnic sued and entered a settlement agreement with the employer, but the employer then gave Marohnic false negative references so that he would be unable to get a new job. *Id.* at 615. In reversing the district court's grant of summary judgment, the court held that Marohnic's speech did not hinder the operation of government because it was intended to stamp out fraud within the agency. *Id.* at 616. The court went on to explain:

> When an employee exposes unscrupulous behavior in the workplace, his interests are co-extensive with those of his employer; both want the organization to function in a proper manner.

Id.

Williams is similar in that, as in *Marohnic,* the plaintiff was a witness to official corruption and participated in a government investigation after being approached by law enforcement authorities. *See Williams*, 24 F.3d at 1530-31. Rahn, on the other hand, developed personal doubts regarding the ethical and legal implications of a practice in the office, and those doubts were *debatable.* Moreover, Rahn never suggests that there is anything criminal about the FOC handling of child support prosecutions. At most, she complained that the situation could pose ethical problems for attorneys handling child support cases. If she was seriously concerned about exposing herself to potential discipline, she should have sought an ethics opinion from the bar. It is undisputed that she did not.

CONCLUSION

Having found that the district court was correct in its conclusion that Rahn's termination did not violate her rights under the First Amendment, we also agree with the district court's conclusion that Rahn's conspiracy claim cannot survive. Moreover, as Rahn has no surviving federal claims, the district court properly dismissed her state law claims. Therefore, we AFFIRM the judgment of the district court in its entirety.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 4:00-CV-33

HON. GORDON J. QUIST

[Filed March 12, 2002]

ABBY RAHN,	)
Plaintiff,	)
	)
v.	)
	)
JURIS KAPS, et al.	)
Defendants.	)
	)

ORDER ADOPTING REPORT AND RECOMMENDATION

The court has before it Plaintiff's objections to the Magistrate Judge's Report and Recommendation issued on January 7, 2002, in which the Magistrate Judge recommended that Defendants' motion for summary judgment be granted. After conducting a de novo review of the report and recommendation, the court concludes that the report and recommendation should be adopted by the court.

The facts are set forth in the report and recommendation, and Plaintiff makes no objection to the recitation of facts by the Magistrate Judge. Plaintiff lists numerous objections to the report and recommendation.* Plaintiff basically makes two arguments: (1) the Magistrate Judge failed to properly apply the balancing test enunciated in Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731 (1968), and Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684 (1983), between her interest as a public employee in commenting on matters of public concern and the interest of the state in promoting the efficiency of its services, and (2) the Magistrate Judge erred in concluding that plaintiffs conspiracy claim should be dismissed.

I. Balancing of Interests

Plaintiff contends that the Magistrate afforded too little weight to the matters to which her speech was directed and gave too much weight to Defendants' interest in managing the affairs of the prosecutor's office. Plaintiffs arguments are unpersuasive.

In arguing that the Magistrate Judge did not give enough weight to the public concerto in this matter, Plaintiff elucidates her many arguments against the prosecutor's Friend of the Court ("FOC") plan for child support functions. Under the new arrangement, the county FOC would take over many of the prosecutor's functions in child support cases. The FOC

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* Defendants moved the court to strike Plaintiff's filings because the objections and the accompanying brief were signed by Plaintiff herself rather than her attorney of record. Defendants contend that the filing violates Fed. R. Civ. P. 11(a). Because the court rejects Plaintiff's objections and adopts the report and recommendation, the court need not strike the filing.

would take referrals, investigate cases, prepare pleadings and other paper work such as the letter to "the putative father and the motion for entry of default, coordinate blood testing, and perform other administrative functions. The plan was part of a pilot project in conjunction with the State Court Administrative Office ("SCAO"). Plaintiff contends that the "scheme" is so egregious as to amount to ethical and constitutional violations, and thus her speech deserved more weight than it received.

The court will not examine the merits Plaintiffs criticisms of the child support division plan. The Magistrate Judge concluded, as does the court, that Plaintiff's speech did raise issues of public concern such that an examination of the state's interest was required. The Magistrate Judge properly concluded that Plaintiff's speech involved "whether the Van Buren County government was operating in accordance with the law with respect to child support matters." (Rep. and Rec. at 10.) The conclusion that the state's interest in efficient execution of services and policies outweighs the employees interest in speech of matters of public concern does not mean that the issues Plaintiff raised were not given due consideration.

Plaintiff also seeks to minimize the nature and effect of her speech on the prosecutor's office. Plaintiff makes two points, both of which the Court rejects. First, Plaintiff distinguishes between the official duties of the prosecutor and the policy-making privilege of the prosecutor. Plaintiff then contends that Monks v. Marlinga, 923 F.2d 423 (6th Cir. 1991), is inapposite to this case because it addressed only politically motivated speech, not an assistant prosecutor's speech exposing allegedly unlawful activities. Plaintiff makes a distinction without a difference because Monks is cited to demonstrate the role of the assistant prosecutor in aiding the

prosecutor and the discretion the prosecutor has in running the office and carrying out his duties. Moreover, courts have identified the similarity of issues in cases involving allegedly political terminations of "policymaking" public employees, the issue in Monks, and those involving public employee speech on matters of public concern. See Bibbs v. Newman, 997 F. Supp. 1174 1187 (S.D. Ind. 1998).

Second, Plaintiff objects to the Magistrate Judge's emphasis on the need for trust and confidence in the prosecutor's assistants. Plaintiff asserts that her speech was neither public nor critical in nature and did not impair a trustworthy relationship with the prosecutor. Plaintiffs attempt to characterize her conduct as benign is contrary to the facts. Between September 28 and November 9, 1999. Plaintiff wrote letters to Judge Hamre, defendant Board, and John Ferry at the SCAO, and she filed a grievance with the Michigan Attorney Grievance Commission, on each occasion alleging that the prosecutor's new "scheme" was illegal, unethical, and unconstitutional. These are certainly significant accusations. In these writings, Plaintiff also intimated that certain individuals were not fully disclosing the details of the new plan. That she did not write a letter in a newspaper or give a report on television does not make her conduct less disruptive. That she did not explicitly name Kaps as a liar does not render her conduct harmless. As Plaintiff's discharge letter indicates, the prosecutor could no longer trust her or rely on her to adequately carry out her role. Given the broad discretion the prosecutor has in running his office and the need for loyalty, confidence, and trust in his relationship with his assistant prosecutors, Plaintiffs interest in her speech did not outweigh the state's interest in promoting the adequacy and efficiency of public services.

II. The Conspiracy Claim

Plaintiffs other objection to the report and recommendation is that the Magistrate Judge erred in concluding that her conspiracy claim under § 1983 should be dismissed. Plaintiff asserts that inferences from the facts support a finding of a conspiracy by the defendants. Plaintiffs lengthy recitation of Deja's and other defendant's activities and the inferences that may be drawn from them is inconsequential. Since there has not been a constitutional violation, there can be no claim for a conspiracy to deprive Plaintiff of a constitutional right. Plaintiffs argument does nothing to refute this conclusion.

Conclusion

For the foregoing reasons, IT IS HEREBY ORDERED that the Magistrate Judge's Report and Recommendation issued January 7, 2002 (docket no. 64) is APPROVED AND ADOPTED as the Opinion of this court, and the decision granting summary judgment to Defendants is **AFFIRMED.**

IT IS FURTHER ORDERED that Defendants' Motion to Strike Plaintiff's Objections to the Report and Recommendation (docket no. 67) is DENIED.

This case is closed.

Dated March 11, 2002

/s/
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 4:00-CV-33
Hon. Gordon J. Quist

[Filed January 7, 2002]

ABBY RAHN,
Plaintiff,

v.

JURIS KAPS, in his individual and official capacity, LYNN ANN BULLARD, an her individual and official capacity, VAN BUREN COUNTY, VAN BUREN COUNTY BOARD OF COMMISSIONERS, CALVIN TEAGUE, in his individual and official capacity, and SHARON K. DEJA,
Defendants.

REPORT AND RECOMMENDATION

Plaintiff, a former assistant prosecuting attorney in Van Buren County, has filed a federal civil rights action pursuant to 42 U.S.C. § 1983, claiming that her employment was terminated in retaliation for exercising her rights of free

speech. The matter it now before the court on a motion for summary judgment filed by defendants Van Buren Prosecuting Attorney Juris Kaps ("Kaps"), Van Buren County Friend of the Court Lynn Ann Bullard ("Bullard"), Van Buren County ("County"), Van Buren County Board of Commissioners ("Board") arid Van Buren County Administrator Calvin Teague ("Teague") (docket no. 54) and a motion to dismiss or for summary judgment filed by defendant Sharon Deja (docket no. 50).

Plaintiff's Allegations

Plaintiff makes the following allegations in her First Amended Complaint. From March 1982 through September 30, 1999, she served as an assistant prosecuting attorney in Van Buren County, performing the child support prosecution functions for the Prosecutor's Office Child Support Division. First Amended Complaint at ¶ 10. On September 17, 1999, her employer, Van Buren County Prosecuting Attorney Juris Kaps, informed her that the child support division would be disbanded on September 30, 1999 pursuant to a request from the State Court Administrator's Office (SCAO), and that the Van Buren County Friend of the Court (FOC) would perform all prosecutorial functions on child support cases. *Id.* at ¶¶ 11-12. Plaintiff expressed her concern about the legal ethical and constitutional violations arising from the FOC's prosecution of child support cases by writing a letter to Van Buren Circuit Judge Paul Hamre and sending a copy of the letter to defendant Board. *Id.* at ¶¶ 13, 15.

Plaintiff was subsequently transferred to the prosecutors criminal division. *Id.* at ¶ 17. She had several confrontations with defendant Kaps, between October 1, 1999 and her termination on December 21, 1999. *Id.* at ¶¶ 18-19. On October 15th, plaintiff notified Wallace Dutkowski, director

of the state's office of child support, of her belief that the FOC scheme, was unethical or illegal. *Id.* at ¶ 20. On October 21st, plaintiff sent a letter to John Ferry, director of the SCAO, to notify his office "of the unethical, illegal, and unconstitutional aspects and activities of the Court/Friend of the Court scheme." *Id.* at ¶ 21. Plaintiff filed a grievance with the Michigan Attorney Grievance Commission against defendant Bullard on November 9th, concerning the "ethical and legal violations inherent in Defendant Bullard's participation in the Court/Friend of the Court scheme." *Id* at ¶ 23.

On December 2nd, defendant Kaps suspended plaintiff for three days "for allegedly failing to attend to her court duties." *Id.* at ¶124. Defendant Kaps met with plaintiff on December 9th advising her that he was relieving her of her duties as an assistant prosecutor. *Id.* at ¶ 26. On December 21st, plaintiff, received a letter from defendant Kaps terminating her employment. *Id.* at ¶ 28. Plaintiff contends that the motivation for her firing "was solely to retaliate against her for her constitutionally-protected speech and reports to public bodies and agencies about the illegal and unconstitutional actions." *Id.*

Plaintiff's First Amended Complaint consists of both federal and state claims. In her federal count, Plaintiff alleges that defendants Kaps, Bullard, Teague, County and Board violated her First Amendment rights

> in that they colluded/arranged to have her wrongfully terminated in retaliation for Plaintiff's exercise of her constitutionally-protected right of free speech and when they discriminated against Plaintiff . . . regarding the terms, benefits, conditions, and privileges of her employment because she reported

> suspected violation [sic] of law, regulation, or rule of the state of Michigan, violation of the federal and state constitutions, and ethical violations by attorneys.

Id. at par. 30.

Plaintiff' s allegations against defendant Deja, a manager at the SCAO, are much more limited. Plaintiff alleges that defendant Deja planned the FOC "scheme" for Van Buren County, but told plaintiff on October 1, 1999 that she knew nothing about the project. *Id.* at ¶ 16. Plaintiff further alleges that defendant Deja

> in her role as manager of the State Court Administrator's Office, and participant in the Friend of the Court scheme, advised Plaintiff she should cease and desist from inquiries into the scheme or she could "lose her job," or words to that effect. In so doing, Defendant Deja, at a minimum, and acting under color of state law, implied her involvement in the decisions and actions which deprived Plaintiff of her constitutional rights and directly led to the termination of her employment.

Id. at ¶ 31.

In her state law count, plaintiff alleges that defendants Kaps, Teague, County and Board violated the provisions of Mich. Comp. Laws § 15.361 er *seq.* (the "Whistieblowers' Protection Act")

> when they fired Plaintiff and/or refused to rescind Plaintiff's termination, and further discriminated against Plaintiff regarding the terms, benefits, conditions, and privileges of her employment because

she reported a violation or suspected violation of a law, regulation, or rule of the state of Michigan and opposed practices made illegal.

Id. at ¶ 42.

Discussion

I. Standard of Review

Defendants Kaps, Bullard, County, Board and Teague have moved for summary judgment pursuant to FRCP 56. In *Copeland v. Machulis*, 57 F.3d 476 (6th Cir. 1995), the court described the standard for deciding a Rule 56 motion as follows:

> Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *LaPointe v. UAW, Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). The moving party bears the initial burden of establishing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 2552-53, 91 L.Ed.2d 265 (1986). Once the moving party has met its burden of production, the nonmoving party cannot rest on its pleadings, but must present significant probative evidence in support of the complaint to defeat the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986); *LaPointe,* 8 F.3d at 378. The mere existence

> of a scintilla of evidence to support plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. *Anderson,* 477 U.S. at 252.

Id. at 478-79. "In deciding a motion for summary judgment, the court views the factual evidence and draws all reasonable inferences in favor of the nonmoving party." *McLean v. 988011 Ontario Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000).

"Defendant Deja moves for dismissal under FED. R. CIV. P. 12 and, alternatively, for summary judgment under Rule 56. Because defendant Deja relies on evidence and documents outside of the pleadings, the court will consider her motion as one brought pursuant to Rule 56.

II. Plaintiff's Federal Claims

Plaintiff's first amended complaint alleges a First Amendment retaliation claim against defendants. Although plaintiff's counsel has failed to clearly designate two separate federal claims, a charitable reading of plaintiff's first amended complaint indicates two separate claims. First, plaintiff alleges that defendants retaliated against her because she challenged the FOC "scheme" to prosecute child support cases. Second, plaintiff alleges that defendants conspired to have her employment terminated in retaliation for her exercise of her right of free speech to criticize the plan.

A. The FOC plan

This dispute involves plaintiff's opposition to an agreement by which certain functions of the child support process were transferred from the prosecutor's office to the FOC's office. Plaintiff testified that she performed the

following duties prior to the agreement: enter referrals for child support or paternity into the computer from the Michigan Family Independence Agency (FIA); send out appointment letters to the parties; and report "no-shows" or uncooperative referrals to the FIA. Rahn deposition at 278-79, attached as Exh. 1 to Response to Deja. The referral included the parties' names, addresses, employers, child's name, child's date of birth, and, in some cases, information regarding other sexual contacts when the child was conceived, *Id.* at 281-2. If the referral arrived, then the investigator would perform an interview. *Id.* at 279-80. If problems arose, then plaintiff would review the material. *Id.* If there was no need for a further investigation, then plaintiff would serve the defendant, "try to get the matter settled or get blood tests set or whatever needed to be done." *Id.* at 280. If the defendant did not respond, then plaintiff would obtain a default judgment. *Id.* at 280-81. If there was an acknowledgment of paternity by the putative father, then plaintiff would prepare a family support complaint. *Id.* at 282-83.

Under the agreement, defendants Bullard and Deja testified that the FOC would perform the following work: intake of referrals; investigate cases; prepare pleadings and other paperwork, including the complaint, summons, letter to the putative father, default, motion for entry of default and consent orders as required; coordinate blood testing of the putative fathers; and other related administrative functions. Bullard deposition at 24-8, attached as Exh. 3 to Bullard's Brief; Deja deposition at 21-2, attached as Exh. 4 to Deja's Brief. Defendant Deja further testified that the prosecutor maintained the prosecutorial functions if a child support matter was contested and that the prosecutor's office would be reimbursed for actual expenses incurred in paternity trials or felony support actions. Deja deposition at 55-6.

B. Elements of a First Amendment retaliation claim

Plaintiff alleges that defendants Kaps, Bullard, Teague, County and Board violated her First Amendment rights by terminating her in retaliation for exercising her First Amendment right to free speech. To succeed on a claim of retaliation in violation of the First Amendment, plaintiff must prove the following elements: (1) she was engaged in a constitutionally protected speech; (2) she was subjected to adverse action or was deprived of some benefit, and (3) the protected speech was a "substantial" or "motivating factor" in the adverse action. *Brandenburg v. Housing Authority of Irvine*, 253 F.3d 891,897 (6th Cir. 2001), quoting *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 9-87 (1977). Because plaintiff was a public employee, she must make two additional showings to demonstrate that her speech was protected. *See Pickering v. Board of Education,* 391 U.S. 563 (1968); *Brandenburg*, 253 F.3d at 897. First, she must show that her speech touched on matters of public concern. *See Connick v. Myers*, 461 U.S. 138, 146 (1987). Second, plaintiff's interest as a public employee "in commenting upon matters of public concern" must be found to outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. *See also Connick*, 461 U.S. at 149-52; *Leary v. Daescher*, 228 F.3d 729, 736-37 (6th Cir. 2000); *Boger v. Wayne County*, 950 F.2d 316, 322 (6th Cir. 1991). "Only if an employee can satisfy both parts of this test, thus proving his or her speech was protected, should the court move on to determining whether the last two elements of a cause of action for retaliation - adverse action and motivation - are present." *Brandenburg*, 253 F.3d at 898.

1. Was plaintiff engaged in constitutionally protected speech?

a. Defendant Kaps' December 20, 1999 termination letter

Defendants contend that plaintiff was riot engaged in constitutionally protected speech because (1) her speech did not touch on matters of public concern, and (2) plaintiff's interest as a public employee did not outweigh the state's interest in promoting the efficiency of its public services. Defendants contend that Kaps' December 20, 1999 letter set forth the reasons for terminating plaintiffs employment. In the letter, defendant Kaps stated that he could not trust plaintiff to abide by his directives; that he must have confidence that his policies would be carried out and that nothing would be done to undermine his authority; and that plaintiff had undermined his authority.:

> You have engaged in actions contrary to the directions which you have been given, you have been insubordinate, you have refused direct orders, implied to the State Court Administrator's Office that myself and others have been less than truthful and engaged in a variety of other actions, all of which are contrary to your role as an Assistant Prosecutor working for a Prosecutor. You were not elected Prosecutor of Van Buren County. . . . Whatever your motivation was, it is clear that your actions make it impossible for you to continue as an Assistant Prosecutor.

12/20/99 letter attached to defendant Kaps' Brief as Exh. AA.

In the termination letter, defendant Kaps specifically refers to plaintiffs October 21, 1999 letter written to the

SCAO as one event that led to her termination. Plaintiffs October 21st letter asked the SCAO director to address "a number of seeming ethical and legal violations" involved with the "new friend of the court prosecution plan in Van Buren County." 10/21/99 letter attached to defendant Kaps' brief as Exh. X. In this letter, plaintiff implied that defendant Kaps, defendant Bullard and Judge Hamre were untruthful in advising her that the new plan was a pilot project initiated by the SCAO. *Id.* As attachments to this letter, plaintiff included copies of her September 28, 1999 letter to Van Buren County Circuit Judge Hamre and Judge Hamre's reply. *Id.*

In plaintiff's September 28th letter to Judge Hamre, she complained to the judge that the proposed plan to have the FOC prosecute child support cases was unethical and unlawful. 9/28/99 letter attached to defendant Kaps' brief as Exh. S. In his reply, Judge Hamre thanked plaintiff for expressing her concerns and stated that although he respected plaintiff's opinion on the legal and ethical aspects of this decision, he believed "that the appropriate department heads and elected officials have made the proper decision after fully exploring the pros and cons of the proposed new formal for child support matters." 9/30/99 letter attached to defendant Kaps' brief as exh T.

b. Matter of public concern

The First Amendment protects speech that a court may fairly characterize constituting speech on a matter of public concern. *See Lucas v. Monroe County*, 203 F.3d 964, 973 (6th Cir. 2000). To constitute a matter of public concern, a court "must be able to fairly characterize the expression as relating to a matter of political, social, or other concern to the community." *Chappel v. Montgomery County Fire Protection*

Dist. No. 1, 131 F.3d 564, 573 (6th Cir. 1997) (citation omitted).

> Speech by public employees may be characterized as not of "public concern" when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of the governmental agencies. On the other hand, speech that concerns "issues about which information is needed or appropriate to enable the members of society" to make informed decisions about the operation of their government merits the highest degree of first amendment protection.

McKinley v. Cir. of Eloy, 705 F.2d 1110, 1114 (6th Cir. 1983) (citations omitted). "Generally, '[p]ublic interest is near its zenith when ensuring that public organizations are being operated in accordance with the law,'" *Brandenburg*, 253 F.3d at 898, quoting *Marohonic v. Walker*, 800 F.2d 613,616 (6th Cir. 1986).

Plaintiff's October 21st letter to the SCAO raised issues of concern to the community; i.e., whether the Van Buren County government was operating in accordance with the law with respect to child support matters. The public nature of these issues is evident in Judge Hamre's September 30th reply, in which he stated that the appropriate department heads and elected officials had made the proper decision on the issue "after fully exploring the pros and cons of the proposed new format for child support matters." Plaintiff raised an issue that involved a matter of public policy that could be debated among public officials and which resulted in the elimination of the prosecutor's child support division. Under these circumstances, plaintiffs speech, as set forth in

her October 21st letter, can be fairly characterized as constituting speech on a matter of public concern.

c. Interest of the state

Nevertheless, plaintiff is not entitled to First Amendment protection. Although plaintiff raised an issue of public concern, her employer, an elected county prosecutor, had wide discretion to manage the personnel and internal affairs of his office, including "the prerogative to remove employees whose conduct hinders efficient operation" *Connick*, 461 U.S. at 151 (quoting *Amett v. Kennedy*, 416 U.S. 134, 168 (1974)). As the Supreme Court observed in *Connick*:

> Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect the discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Id.

Plaintiff was employed as an assistant prosecuting attorney. Under Michigan law, assistant prosecuting attorneys are appointed by the county prosecuting attorney and "shall hold office during the pleasure of the prosecuting attorney." Mich. Comp. Laws §§ 49.31, 33, 34 and 35. In addition, an assistant prosecutor must "perform any and all duties pertaining to the office of prosecuting attorney." *Monks v. Marlinga*, 923 F.2d 423,425-6 (6th Cir. 1991), quoting Mich. Comp. Laws § 49.42. Consequently, a prosecuting attorney in Michigan has wide discretion to terminate the employment of his assistant prosecutors. *See, e.g., Monks*, 923 F.2d at 425-26 (politically motivated discharge of an assistant prosecutor does not violate the First Amendment).

In addition, courts have observed that the employment relationship between a prosecuting attorney and an assistant prosecuting attorneys is one requiring personal loyalty. *See Livas v. Petka*, 711 F.2d 798, 800-01 (7th Cir. 1983); *Bibbs v. Newman*, 997 F. Supp. 1174, 1187-88 (S.D. Ind. 1998). A prosecuting attorney must have confidence in the assistant prosecutor's ability to follow the prosecutor's policies and exercise judgment in implementing those policies. *See Bibbs*, 997 F. Supp. at 1188. See *also, Monks*, 923 P.2d at 425-6. An assistant prosecutor, as a public employee with a policymaking role, has "substantially less First Amendment protection than does the lower level employee." *Johnson v. Yurick*, 156 F. Supp.2d 427,434 (D. N.J. 2001), quoting *McVey v. Stacy*, 157 F.3d 271, 278 (4th Cir. 1998).

The Seventh Circuit described the special relationship that exists between a prosecutor and the assistant prosecutors in *Livas*, in which the court upheld the dismissal of an assistant prosecuting attorney (referred to as an assistant "State's Attorney") who claimed that his dismissal was politically motivated in violation of his First Amendment rights:

> A public prosecutor, such as State's Attorney Petka, exercises broad public responsibilities in the performance of his duties. A prosecutor's "client" is not an individual, but society as a whole. And the prosecutor has the broad discretion to set whatever policies he or she believes necessary to profit the interests of that society.
>
> One of the problems faced by a prosecutor such as Petka, however, is that his policies are implemented by subordinates. Indeed, an Assistant State's Attorney may, in carrying out his or her duties, make some decisions that will actually create policy. *Cf. Newcomb*

> *v. Brennan*, 558 F.2d 825, 830 (7thCir. 1977) (upholding politically motivated dismissal of a deputy city attorney). The public interest in the efficient administration of justice requires that decisions made by such assistant prosecutors conform with the broad objectives chosen by the prosecutor.
>
> For this reason, Petka was entitled to demand absolute loyalty from his assistants, including Livas. That Petka lost confidence in Livas, for whatever reason, is therefore sufficient justification for Livas' dismissal. *See Newcomb v. Brennan*, 558 F.2d 825, 830 (7th Cir. 1977).

Livas, 711 F.2d at 800-01.

As noted previously, plaintiff questioned defendant Kaps' honesty and policies in her letters to the SCAO and Judge Hamre. Such action could certainly erode defendant Kaps' confidence and trust in plaintiff. Under the circumstances, plaintiff's interest as an assistant prosecutor in commenting upon matters of public concern did not outweigh the interest of her employer in promoting the efficiency of the public services performed through the prosecuting attorney's office. *See Connick*, 461 U.S. at 149-52; *Pickering*, 391 U.S. at 568; *Leary*, 228 F.3d at 736-37; *Boger*, 950 F.2d at 322; *Livas*, 711 F.2d at 800-01. In this regard, the court adopts, as modified, the following quote from *Bibbs*:

> Even though [plaintiff] addressed a matter of public concern in her criticism of the office, the need for trust and loyalty between the elected official and his or her deputies to ensure the effectiveness of the public office outweighs [plaintiff's] First Amendment

> interests to the extent she wanted to remain employed by the office she had attacked.
>
> This last qualification should not be overlooked. At the risk of stating the obvious, we should not lose sight of the fact that, under all the First Amendment cases and balancing tests, a public employee remains free to criticize his or her employer publicly or privately. Resigning in protest, as a matter of principle–loudly or quietly–is a long tradition in the public life of the United States. The issue in the cases, however, is the different question whether the public employee is also entitled to insist that the target of her public, criticism continue to trust her to carry out the public's work for which the elected official is responsible.

Bibbs, 997 F. Supp. at 1187.

"Plaintiff has failed to demonstrate that she engaged in conduct that was constitutionally protected and, as a result, cannot maintain a First Amendment retaliation claim against defendants. Accordingly, plaintiff's First Amendment retaliation claim should be dismissed.[1]

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[1] Plaintiff apparently contends that officials other than her employer, defendant Kaps, could be held responsible for the termination of her employment. However, because plaintiff has failed to demonstrate the deprivation of a constitutionally protected right, it is unnecessary for the court to address that issue. Likewise, it is unnecessary to address defendant Kaps' claim of qualified immunity.

B. Conspiracy to deprive plaintiff of her First Amendment rights

Next, it is necessary to review plaintiffs claims that defendants conspired to deprive her of her First Amendment rights. In *Pangburn v. Culbertson*, 200 F.3d 65 (2nd Cir. 1999), the court set forth the elements of a conspiracy claim under § 1983:

> To prove a § 1983 conspiracy, a plaintiff must show: (1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages.

Pangburn, 200 F.3d at 72.

In order to survive a motion for summary judgment on her § 1983 conspiracy claim, plaintiff must set forth specific facts showing either the existence or execution of the claimed conspiracy. *Lepley v. Dresser*, 681 F. Supp. 418, 422 (W.D. Mich. 1958). "[T]hese facts must show overt acts related to the promotion of the conspiracy and some link between the alleged conspirators" and "that the conspirators agreed to commit an act which deprived the plaintiff of a right, privilege or immunity secured by the Constitution or the laws of the United States." *Id.* Furthermore, "[i]t is essential that the, conspiratorial conduct in fact resulted in a violation of plaintiff's constitutional rights." *Id.*

Plaintiff has failed to show that the alleged conduct violated her First Amendment rights. Because plaintiff cannot prove that the alleged conspiracy resulted in a violation of her

constitutional rights, her claim must fail. Accordingly. plaintiffs conspiracy claim should be dismissed.

III. Plaintiff's State Claims

Finally, plaintiff has included a state claim under the Whistleblowers' Protection Act (WPA). Mich. Comp. Laws § 15.362 **et seq.**

A. Supplemental jurisdiction

Section 1367 of Title 28 of the United States Code provides that "the district court shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form a part of the same case or controversy." 28 U.S.C. § 1367(a). Here, the court initially exercised its supplemental jurisdiction over plaintiff's whistleblower's claim, because that claim was intimately, related to the alleged § 1983 violation. The dismissal of plaintiff's federal claims however, requires the court to re-examine, the issue of supplemental jurisdiction. Section 1367(c)(3) provides that a district court may decline to exercise supplemental jurisdiction over a claim if the court "has dismissed all claims over which it has original jurisdiction."

Once a court has dismissed a plaintiff's federal claim, the court must exercise its discretion on whether to exercise, or not to exercise, its supplemental jurisdiction under § 1367. *See Campanella v. Commerce Exchange Bank*, 137 F.3d 885, 892-893 (6th Cir. 1998). "When all federal claims are dismissed before trial the balance of considerations usually will point to dismissing the state law claims." *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1254-1255 (6th Cir. 1993). Such a dismissal should not

prejudice a plaintiff's ability to bring those claims in state court, because § 1367(d) provides that the period of limitations for any claim asserted under § 1367(a) "shall be tolled while the claim is pending and for a period of 30 days after its dismissal unless State law provides for a longer tolling period."

B. Plaintiff's claims under the WPA

Here, plaintiff alleges that defendants Kaps, County and Board violated the WPA because they

> fired Plaintiff and/or refused to rescind Plaintiff's termination. . . . because she reported a violation or suspected violation of a law, regulation, or rule of the state of Michigan and opposed practices made illegal.

First Amended Complaint at ¶ 42. The WPA was designed to protect the public from unlawful conduct by corporations and government bodies by removing barriers to the reporting of violations of law by employees. *See Anzaldua v. Band*, 457 Mich. 530, 533; 578 NW2d 306 (1998). Under the WPA:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee . . . reports or is about to report, verbally or in writing, a violation or suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body . . .

Mich. Comp. Laws § 15.362.

In order to establish a prima facie case of retaliation under the WPA, a plaintiff must demonstrate:

(1) That the plaintiff engaged in protected activity as defined by the Act;

(2) That the plaintiff was subsequently discharged from employment; and

(3) That there is a causal connection between the protected activity and the discharge.

James v. HRP, Inc., 852 F. Supp. 620, 625 (W.D. Mich.1994), quoting *Wolcott v. Champion Int'l Corp*, 691F. Supp. 1052, 1058 (W.D. Mich. 1987). An employee is involved in "protected activity" under the WPA when that employee has reported, or is about to report, a suspected violation of law to a public body. *Shallal v. Catholic Social Services of Wayne County*, 455 Mich. 604, 610; 566 N.W.2d 571 (1997).

While "overwhelming interests in judicial economy" may allow a district court to decide a pendent state claim even if the federal claim has been dismissed before trial, *Aschinger v. Columbus Showcase Co.*, 934 F.2d 1402, 1412 (6th Cir. 1991), plaintiff has failed to demonstrate any compelling reason for this court to retain supplemental jurisdiction over her pending state claims. This case involves the employment relationship between an elected county prosecutor and an assistant prosecutor with respect to prosecuting individuals in child support and paternity actions. The Michigan state courts are in the best position to adjudicate plaintiffs claim, which allegedly involves the violation of state laws and the ethical duties of a county prosecutor. No overwhelming interests m judicial economy will be served by hearing plaintiff's WPA

claim in federal court rather than in a state court. Accordingly, the court should not retain supplemental jurisdiction over plaintiff's state law claims under the WPA.

Recommendation

Accordingly, I respectfully recommend that plaintiff's federal claims under § 1983 be dismissed and that the court not retain supplemental jurisdiction, over her state law claims.

Entered: 1/7/02

/s/
Hugh W. Brenneman, Jr.
U.S. Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be served and filed with the Clerk of the Court within ten (10) days after service of the report. All objections and responses to objections are governed by W.D. Mich. LCivR 72.3 (b). Failure to serve and file written objections within the specified time waives the right to appeal the District Court's order. *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).